

UNIVERSITY OF KWAZULU-NATAL

Short title

Do the words ‘a public official or other person acting in an official capacity’ in s 3 of the Prevention and Combatting of Torture of Persons Act 13 of 2013 conflict with s 12(1)(d) of the Constitution of the Republic of South Africa?

Long title

Do the words ‘a public official or other person acting in an official capacity’ in s 3 of the Prevention and Combatting of Torture of Persons Act 13 of 2013 conflict with s 12(1)(d) of the Constitution of the Republic of South Africa, 1996, which states that the right to freedom and security of persons includes the right to not be tortured in any way?

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Acknowledgments

Dear Professor McQuoid Mason: You lead by example. The best way I could think of to thank you for your time and patience is to make sure that I use the education that you have provided me with to always follow your example. This I will do through the pursuit of justice, regardless of who my opponent may be. Thank you Prof, I hope to make you proud.

My dear wife Ria and daughter Maya: The loves of my life. We've missed weekends and and postponed all sorts of adventures so that I could get this work done. Your support and understanding has been an essential part of this work.

Declaration

This project is an original piece of work which is made available for photocopying and for inter-library loan.

Signed at Durban on this the 28th day of April 2017

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List of abbreviations

Abbreviated term	Full description
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, A/RES/39/64 (1984).
ICCPR	International Covenant on Civil and Political Rights UN Doc. A/6316 (1966).
Rome Statute	Rome Statute of the International Criminal Court A/CONF.183/9 (2002).
Declaration of Tokyo	World Medical Association Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (1975).
CT	United Nations Committee Against Torture.
HRC	United Nations Human Rights Committee.

Table of contents

Acknowledgments	2
Declaration.....	3
List of abbreviations	4
Chapter 1: Introduction	8
1.1 Introduction	8
1.2 Aims of this dissertation.....	11
Chapter 2: The prevalence of torture	13
2.1 Introduction.....	13
2.2.1 Solitary Confinement	15
2.2.2 Assault and humiliation	17
2.2.3 Electric shocks	18
2.3 The horizontal threat of torture	18
2.3.1 Assault and humiliation	19
2.3.2 Xenophobic attacks	19
2.3.3 Sexual violence.....	19
2.4 Conclusion	20
Chapter 3: An interpretation of the constitutional right to be free from torture	21
3.1 Introduction.....	21
3.2 Literal interpretation of s 12(1)(d)	21
3.3 Purposive interpretation of s 12(1)(d)	22
3.3.1 Contextual factors	22
3.3.1.1 Apartheid history	22
3.3.1.2 The drafting of the Constitution	23
3.3.2 The right to freedom from torture and international law	25
3.3.2.1 Introduction.....	25
3.3.2.2 Torture in international law	25
3.3.2.4 The United Nations Human Rights Committee and the International	

<i>Covenant on Civil and Political Rights</i>	28
3.3.2.5 <i>The Rome Statute of the International Court of Justice</i>	29
3.3.2.6 <i>The World Medical Association’s Declaration of Tokyo</i>	30
3.4 <i>Conclusion</i>	31
Chapter 4: A purposive interpretation of ‘a public official or other person acting in an official capacity’	32
4.1 <i>Introduction</i>	32
4.2 <i>Literal interpretation</i>	32
4.3 <i>Purposive interpretation</i>	33
4.3.1. <i>Preamble</i>	33
4.3.2. <i>Parliamentary debates</i>	34
4.3.3. <i>Reports</i>	34
4.4 <i>Conclusion</i>	36
Chapter 5: Remedies available to victims of private instances of torture ...	37
5.1 <i>Introduction</i>	37
5.2 <i>Definitional elements of torture</i>	38
5.2.1 <i>Culpability</i>	38
5.2.2 <i>Conduct</i>	38
5.2.3 <i>Purpose</i>	38
5.2.4 <i>Severity</i>	39
5.3 <i>Types of crimes</i>	41
5.3.1 <i>Assault</i>	41
5.3.2 <i>Pointing of a firearm</i>	41
5.3.3. <i>Sex crimes</i>	42
5.3.4 <i>Criminal defamation</i>	44
5.3.5 <i>Kidnapping</i>	44
5.4 <i>Conclusion</i>	45
Chapter 6: Conclusion	46
6.1 <i>Findings</i>	46
6.2 <i>Recommendation</i>	46
6.3 <i>Suggested further area of research</i>	47

Bibliography	49
Primary sources	49
Table of cases.....	49
International Courts	50
Foreign Courts	50
International committees.....	50
Table of legislation	52
International Conventions	52
Secondary sources.....	53
Journals.....	53
Textbooks.....	54
Essays	55
Dictionaries.....	55
Websites	56
Theses, dissertations and research reports.....	57
Bills	58
Reports	58

Chapter 1: Introduction

1.1 Introduction

A full account of human history would be incomplete without frequent reference to torture. States have used and continue to use¹ torture as a weapon against those persons it considers enemies. For instance, in 1252 Pope Innocent IV decreed that torture be used when questioning persons accused of heresy.² Under Royal authority in 17th century Scotland, Catholic priests were tortured as punishment for holding mass. Methods used included sleep deprivation, driving needles under the victim's nails, prodding victims with stakes and throwing the suspect to the ground.³ Between 1882 and 1940, in an attempt to restore white minority rule in the Southern States of the United States of America, people of colour were lynched in their thousands, while several hundred of these victims were first tortured. In these cases the public authorities either played a part or at the very least acquiesced in it by doing nothing to stop the violence. Reports exist of victims being burned with blow torches, receiving severe beatings, being shot in a manner so as to prolong their suffering, and having flesh ripped from their bodies with red hot tongs.⁴ More recently under Apartheid torture was used extensively. On one occasion this included the slamming of a fourteen year old child's penis and testicles in a drawer⁵ and taking an un-weaned baby from his mother for 8 consecutive days and nights. All the time the child was separated from his mother she was played the sounds of his crying.⁶ Details have recently emerged of the torture of a specific person accused of withholding information regarding possible attacks against the United States of America. Techniques included keeping the detainee in a coffin for a total of 11 days and 2 hours over a twenty day period, not including the 29 hours he was kept in a box measuring 2.5 feet in height and depth with a width of 21 inches. Further to this detainees were kept naked except for nappies in concrete cells, held in total darkness, forced to listen to

¹ Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 167.

² Henry C Lea *Superstition and Force: Essays on the Wager of Law, the Wager of Battle, the Ordeal, Torture* (2nd ed rev) 1870 at page 397.

³ McCarry Kidd King *James VI and the Demonic Conspiracy: Witch-hunting and anti-Catholicism in 16c. and early 17c. Scotland* (MPhil History 'dissertation', University of Glasgow, 2004) at page 30

⁴ D Roberts 'Torture and the biopolitics of race' (2008) 62 *University of Miami Law Review* 229, 231 – 232.

⁵ *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 118.

⁶ *Truth and Reconciliation Commission Final Report of South Africa* Volume 2 Chapter 3 (29 October 1998) at paras 115 – 116.

loud rock music played 24 hours a day, were deprived of sleep for as long as 52 hours at a time, severely beaten, water-boarded and placed in uncomfortable postures for extended periods of time.⁷ Other popular forms of torture include the application of electricity to sensitive areas of a victim such as their nipples or genitals. Another form of torture that is popular in modern times is waterboarding. Waterboarding is any form of torture where a victim is suffocated with water to produce the sense of drowning and dying.⁸ There are many forms of waterboarding such as when victims are forced under water to produce the feeling of drowning. In some cases water under pressure is forced into the patients mouth and nose, making it impossible to breathe.⁹ reports that some victims face having their heads completely covered with a plastic bag, which is removed just before the victim dies from suffocation.¹⁰ This form of torture is sometimes referred to as the ‘dry submarino’.¹¹

In line with international norms¹² post - Apartheid South Africa included a right to be free from torture in its Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the Constitution) where it provides that ‘Everyone... has the right to not be tortured in any way’.¹³

While in South Africa, the freedom from torture as a specific right was given life at the end of apartheid, it was only recently on 29 July 2013, when the Prevention and Combatting of Torture Act¹⁴ (Torture Act) came into effect,¹⁵ that torture became a crime with legislation designed to prevent it.¹⁶ The Torture Act attempts to legislate a right contained in the Constitution. As the Constitution is supreme,¹⁷ it falls to be determined whether the Torture Act definition of torture meets the constitutional requirements placed on it by the right to

⁷ *United States Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (13 December 2012) <https://www.amnestyusa.org/pdfs/sscistudy1.pdf> (date accessed 7 September 2016) at pages 42, 66 – 68 and 113.

⁸ Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 167.

⁹ C Correa ‘Waterboarding prisoners and justifying torture: lessons for the US from the Chilean experience’ (2007) 14(2) *Human Rights Brief* 21, 21 - 22.

¹⁰ Pekka Saukko and Bernard Knight *Knight's Forensic Pathology* (2004) at page 304.

¹¹ J Payne-James, A Busuttil and W Smock (eds) *Forensic Medicine Clinical and Pathological Aspects* (2003) at page 61.

¹² Such as article 5 of the Universal Declaration on Human Rights (1948) (UDHR) and article 7 of the International Covenant on Civil and Political Rights UN Doc. A/6316 (1966).

¹³ Section 12(1)(d).

¹⁴ Prevention and Combatting of Torture of Persons Act 13 of 2013 (Torture Act).

¹⁵ Government Notice 545 of Government Gazette 36716, 29/07/2013.

¹⁶ Torture Act s 4.

¹⁷ The Constitution s 2 provides that the Constitution is supreme and that all law or conduct inconsistent with it is invalid. Section 1(c) provides that South Africa is founded on, *inter alia*, the supremacy of the Constitution.

freedom from torture. The Torture Act defines torture as:

‘For the purposes of this Act, “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(a) for such purposes as to —

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Of particular interest to this dissertation is the phrase ‘a public official or other person acting in an official capacity’¹⁸ as it is submitted that on a *prima facie* reading it applies only to state officials or persons acting under their direction as perpetrators, thus limiting the application of the crime, while the constitutional right to freedom from torture¹⁹ is broadly worded, and may protect all persons, including those tortured by private actors.

The Torture Act specifically provides that despite the operation of the Torture Act, no person is released from liability imposed by any other law.²⁰ Thus, regardless of whether the criminal conduct falls under the ambit of the Torture Act or not, no victim of torture is precluded from seeking another remedy in criminal or civil law. It is acknowledged that instances of torture by private or state-linked persons may result in a claim under the law of delict. This dissertation, however, is concerned with, and will be limited to, the criminal aspects of torture. Criminal law remedies will be discussed without further reference to civil law remedies.

¹⁸ Torture Act s 3(b).

¹⁹ The Constitution s 12(1)(d).

²⁰ Torture Act s 7.

1.2 Aims of this dissertation

Chapter two will establish whether torture is perpetrated by state - linked persons only or if private persons also commit the act. This investigation is important as there would be little point in determining if the right to torture protects victims tortured by state actors and private persons if the crime is only committed by state - linked individuals.²¹

Chapter three will provide a literal and a purposive interpretation²² of the right to freedom from torture²³ with a view to determining whether or not the right extends protection to those tortured by state - linked actors only (a vertical application), or includes victims of private instances of torture (a horizontal application).²⁴

Chapter 4 deals with the fact that the supreme Constitution demands that legislation not be inconsistent with its provisions.²⁵ This requires that the definition of who qualifies as a perpetrator of torture as set out in the definition of ‘torture’ in the Torture Act²⁶ be purposively²⁷ interpreted so that it may be compared and contrasted to the interpretation of the right to freedom from torture.²⁸ This process will bring any inconsistencies between the two to light,²⁹ a matter which will be discussed in Chapter 5.

Chapter 5 will discuss statutory and common law crimes that amount to torture within the meaning of torture as set out in the Torture Act,³⁰ as alternate remedies in cases where private

²¹ See page 10 above.

²² *S v Makwanyane* 1995 (6) BCLR 665 (CC) at paras 9 – 10.

²³ The Constitution s 12(1)(d).

²⁴ This horizontal application of human rights has been recognised and prohibited in the Bill of Rights where at s 8(2) it provides that: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

²⁵ The Constitution s 2 provides that ‘The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.

²⁶ Torture Act s 3(b) expressly provides that torture may be perpetrated by ‘a public official or other person acting in an official capacity’

²⁷ *Bertie van Zyl (Pty) Ltd & another v Minister for Safety and Security & others* 2010 (2) SA 181 (CC) at para 21.

²⁸ The Constitution s 12(1)(d).

²⁹ See *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) at para 34. Iain Currie and Johan de Waal *The Bill of Rights Handbook* 6 ed (2014) at pages 45 and 67 where it is stated that a direct application of law to a dispute means that specific law or conduct is challenged directly against a provision of the Bill of Rights and is required by the Constitution at s 8(2). Should the consequence of a direct application of the Bill of Rights be that legislation is found to fall short of the constitutional requirements set by the Bill of Rights, the law will be declared unconstitutional and invalid.

³⁰ Section 3.

persons commit torture.

Chapter 6 contains a conclusion as well as recommendations for a solution and suggests a possible future area of study.

Chapter 2: The prevalence of torture

2.1 Introduction

This chapter demonstrates that torture is a crime capable of being committed by state-linked perpetrators and by private persons. In this chapter torture committed by the state is referred to as vertical torture while torture committed by private persons is referred to as horizontal torture.

2.2 The vertical threat of torture

Vertical instances of torture are well documented³¹ and include physical assault;³² the ripping out of a victims teeth or nails;³³ electric shocks;³⁴ sex acts;³⁵ asphyxiation;³⁶ psychological

³¹ Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 167. Henry C Lea *Superstition and Force: Essays on the Wager of Law, the Wager of Battle, the Ordeal, Torture* (2nd ed rev) 1870, at page 397. McCarry Kidd *King James VI and the Demonic Conspiracy: Witch-hunting and anti-Catholicism in 16c. and early 17c. Scotland* (MPhil History 'dissertation', University of Glasgow, 2004) at page 30. D Roberts 'Torture and the biopolitics of race' (2008) 62 *University of Miami Law Review* 229, 231 – 232. *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 118. *Truth and Reconciliation Commission Final Report of South Africa* Volume 2 Chapter 3 (29 October 1998) at paras 115 – 116. *United States Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (13 December 2012) <https://www.amnestyusa.org/pdfs/sscistudy1.pdf> (date accessed 7 September 2016) at pages 42, 66 – 68 and 113. Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 167. C Correa 'Waterboarding prisoners and justifying torture: lessons for the US from the Chilean experience' (2007) 14(2) *Human Rights Brief* 21, 21 – 22. Pekka Saukko and Bernard Knight *Knight's Forensic Pathology* (2004) at page 304.

³² Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 166 state that kicking, whipping, punching or beating are common, while Pekka Saukko and Bernard Knight *Knight's Forensic Pathology* (2004) at pages 302 – 303 add that bars, batons, lengths of tube or hosepipe are also used.

³³ J Payne-James, A Busuttil and W Smock (eds) *Forensic Medicine Clinical and Pathological Aspects* (2003) at page 61.

³⁴ Dada, Olumbe and McQuoid-Mason *op cit* at page 167 state that this popular form of torture can be incredibly painful and genitals and nipples are particularly sensitive to electric shock. See: A Moreno and M A Grodin 'Torture and its neurological sequelae' (2002) 40 *Spinal Cord* 213, 217 where the authors state that stun guns, cattle prods and wire plugged into electric wall outlets are often used in this form of torture.

³⁵ Dada, Olumbe, McQuoid-Mason *op cit* at page 167 refer to acts such as rape, being stripped naked, forced to simulate sex acts and having items such as bottles (broken or otherwise) forced into bodily orifices. See: Payne-James, Busuttil and Smock (eds) *op cit* at page 62 where victims are sometimes forced to have sex with each other while their captors watch. See also: *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 156 where a male victim had a brick tied to and hung from his testicles.

³⁶ C Correa 'Waterboarding prisoners and justifying torture: lessons for the US from the Chilean experience' (2007) 14(2) *Human Rights Brief* 21, 21-22 describe the practice of waterboarding. This is any act where water is used to produce a sense of drowning and dying in the victim and includes forcing water into the victim's mouth and nose. Saukko and Knight *op cit* at page 304 state that in other instances the victim simply has a

torture;³⁷ excrement abuse;³⁸ humiliation;³⁹ and isolation.⁴⁰

The Independent Police Investigative Directorate (IPID) is a statutory body⁴¹ mandated to investigate alleged offences or misconduct by members of the South African Police Service.⁴² The IPID states in an Annual Report⁴³ that for the period 2014 – 2015, 145 cases of torture by the police were reported to it. The same number of cases were reported for the period 2015 – 2016.⁴⁴ The Judicial Inspectorate for Correctional Services (JICS) is a statutory body⁴⁵ and is responsible for the inspection of prisons and receiving of complaints from the prisons.⁴⁶ The JICS, in an Annual Report⁴⁷ for the period 2015 – 2016, recorded 15 cases of torture⁴⁸ for all prisons in the South Africa.⁴⁹ These statistics should be viewed with circumspection as they may be inaccurate.⁵⁰

plastic bag placed over their head, making it progressively more difficult for the victim to breathe, until they no longer can.

³⁷ M Strauss 'Torture' (2003–2004) 48 *New York Law School Review* 201, 212 and 224 states that psychological torture is the use of 'psychological ploys' to induce extreme stress in the victim. Dada, Olumbe, McQuoid-Mason *op cit* at page 168 provide the example of threats against the victim's loved ones and victims who have their vision obscured and told that they are about to be shot. Gunshots will be fired but no bullets will strike the victim. It has been stated that this is so terrifying that some victims beg their torturers to carry out the act of shooting them to death See also: *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 97 where the Apartheid police threatened to throw a woman's nephew off of the 13th floor of a building unless she co-operated with them. See further Dada, Olumbe, McQuoid-Mason *op cit* at page 168. Payne-James, Busuttil and Smock (eds) *op cit* at page 62 describe victims who were forced to witness the torture of another person, sometimes a family member.

³⁸ E Domovitch, P Berger, M J Wawer *et al* 'Human torture: description and sequelae of 104 cases' (1984) 30 *Canadian Family Physician* 827, 829 state that some victims are forced to eat excrement or have it poured over them. See: *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 117 where, for up to six months at a time women were unable to wash and were not provided with sanitary products, even during menstruation.

³⁹ Dada, Olumbe, McQuoid-Mason *op cit* at page 166 refer to acts such as being stripped naked and made to stand or parade in front of others, women being forced to consume their own menstrual blood, victims being forced to simulate sex acts and victims being urinated on. See: *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 106 where the incessant use of derogatory name calling was used to humiliate victims.

⁴⁰ Moreno and Grodin *op cit* 217 state that some victims are placed inside tiny cells, no bigger than a box into which they are cramped.

⁴¹ Independent Police Investigative Directorate Act 1 of 2011.

⁴² The Constitution of the Republic of South Africa, 1996 s 206(6).

⁴³ Independent Police Investigative Directorate *Annual Report 2015/2016* (2016).

⁴⁴ Independent Police Investigative Directorate *Annual Report 2015/2016* (2016) at page 48. Amnesty International *Amnesty International Report 2015/6 The State of the World's Human Rights* (23 February 2016) available at <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/> (accessed on 12 September 2016) at page 329 states that torture is also regularly practiced by police against detainees in South Africa, although exact statistics are not available.

⁴⁵ Established by Correctional Services Act 111 of 1998 s 85(1).

⁴⁶ Correctional Services Act 111 of 1998 s 85(2).

⁴⁷ Judicial Inspectorate for Correctional Services *Annual Report 2015-2016* (2016).

⁴⁸ Judicial Inspectorate for Correctional Services *Annual Report 2015-2016* (2016) at page 82.

⁴⁹ Judicial Inspectorate for Correctional Services *Annual Report 2015-2016* (2016) at page 83 all instances of alleged torture are referred to the JICS and are not dealt with solely by resident prison staff.

⁵⁰ The statistics provided by the JICS do not separate prison staff perpetrated torture from inmate perpetrated

Despite the unreliable statistics detailed above⁵¹ the following examples of conduct perpetrated by prison officials and the SAPS show that vertical crimes of torture are indeed a threat to persons in a vertical relationship. In the cases below it is submitted that the victims were caused both severe mental and physical suffering for the purpose of either punishing them for something they or someone else had done. This amounts to torture in the meaning of s 3 of the Torture Act.⁵²

2.2.1 Solitary Confinement

The practice of holding someone in solitary confinement has been labelled ‘one of the worst forms of torture that can be imposed on another human being.’⁵³ Solitary confinement⁵⁴ was permitted as a punishment for prisoners⁵⁵ and was subject to automatic review by the Inspecting Judge.⁵⁶ The term ‘solitary confinement’ was replaced by the more palatable⁵⁷

torture. Further the crime may well be underreported due to what the Truth and Reconciliation Commission termed ‘the silence of vulnerability’ which occurs when torture victims are so ashamed and degraded and perhaps guilt-ridden at having given in to their torturer that they are unwilling to report the offence see: *Truth and Reconciliation Commission of South Africa Final Report Volume 2* (29 October 1998) at page 189. Another explanation for crimes going unreported, thus providing an inaccurate account of the incidence of torture is that victims who belong to prison gangs may prefer to settle the matter using gang resources, rather than report the matter to the authorities, see Judicial Inspectorate for Correctional Services *Annual Report 2015-2016* (2016) at page 91. It is also relevant that the reported incidences of torture may not reflect the actual incidence of the crime as actions which would meet the definition of torture, but which also meet the definition of other crimes may be classified under those other crimes. For instance, rape, severe assaults and murders may simultaneously amount to torture see Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights and NICRO *Thematic Report on Criminal Justice and Human Rights in South Africa. A Submission to the UN Human Rights Committee in Response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th Session of the Human Rights Commission* (March 2016) at page 18. The general lackadaisical attitude of prison staff in recording crimes and assisting those who have been tortured has been noted as another reason for under reporting of the crime. Indeed it has been reported that a great number of prison officials do not understand that torture is a crime or even that it is wrong, see Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights and NICRO *Thematic Report on Criminal Justice and Human Rights in South Africa. A Submission to the UN Human Rights Committee in Response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th Session of the Human Rights Commission* (March 2016) at pages 17 – 21.

⁵¹ See page 14 above where these suspicions are detailed.

⁵² Specifically s 3(a)(ii).

⁵³ Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation into the Department of Correctional Services Appointed by Order of the President of the Republic of South Africa in Terms of Proclamation No. 135 of 2001 as amended at page 334. See also: *Truth and Reconciliation Commission of South Africa Final Report Volume 2 Chapter 3* (29 October 1998) at para 119 where one victim who was kept in solitary confinement for seven months reported feeling as though she were sinking deeper and deeper into the ground and that she became convinced that she was in a coffin surrounded by bodies. The victim reported that ten years after her release she feels as though ‘a part of my soul was eaten by maggots... and I will never get it back again’.

⁵⁴ *Truth and Reconciliation Commission of South Africa Final Report Volume 2 Chapter 3* (29 October 1998) at para 119.

⁵⁵ Correctional Services Act 111 of 1998 s 24(3)(5)(d).

⁵⁶ Correctional Services Act 111 of 1998 s 25(1) and s 25(2).

⁵⁷ Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights and NICRO

term ‘segregation’ in the Correctional Services Amendment Act (Amendment Act).⁵⁸ The Amendment Act imposes several conditions on those seeking to employ the measure, but the net effect is that it has weakened the oversight mechanism in that the automatic review mechanism has been removed.⁵⁹ The change in wording has been severely criticised as ‘segregation’ includes, but is not limited to, ‘detention in a single cell’.⁶⁰ The JICS states that 12678 cases of segregation were reported to it for the period 2015-2016.⁶¹ It is unclear from this statistic how many of the inmates were held in solitary confinement, yet it is submitted that the view that segregation is merely a ‘disguised form of solitary confinement’ is correct.⁶² That segregation is being abused and inmates are being forced into solitary confinement is born out by one report of prison officials ignoring the law relating to segregation. According to the Wits Justice Project⁶³ a prisoner was kept in solitary confinement in St Albans Prison in Port Elizabeth for 293 consecutive days. The prisoner spent the first 60 days of solitary confinement shackled inside his cell. He was allowed only 15 minutes of exercise per day.⁶⁴

Thematic Report on Criminal Justice and Human Rights in South Africa. A Submission to the UN Human Rights Committee in Response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th Session of the Human Rights Commission (March 2016) at page 26.

⁵⁸ Act 25 of 2008 s 18.

⁵⁹ The segregation is for repeated or serious offences so that the inmate may undergo behaviour correction. Furthermore, the inmate must request a review of this segregation, there is no automatic review as there was before the amendment, see Correctional Services Act 111 of 1998 s 25(1) published 27 November 1998. See: Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights and NICRO *Thematic Report on Criminal Justice and Human Rights in South Africa. A Submission to the UN Human Rights Committee in Response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th Session of the Human Rights Commission* (March 2016) at page 27 where the Amendment Act is criticised for weakening the oversight mechanism of what is still solitary confinement. It is stated that inmates now need to know that they have a right to apply for a review, they may not have access to writing material or a telephone.

⁶⁰ Amendment Act s 30.

⁶¹ There is little data on the topic. The JICS does not distinguish between segregation where inmates are kept in solitary confinement and where inmates are kept alone in a cell but with access to meaningful contact with the outside world.

⁶² Dullah Omar Institute for Constitutional Law, Governance and Human Rights *Third Cycle of the Universal Periodic Review, South Africa, Submission to the UN Human Rights Council* available at <http://dullahomarainstitute.org.za/about-us/reviews-submissions-reports/universal-periodic-review-dullah-omar-institute-to-submission-to-the-un-human-rights-council> at page 4 (date of access 6 March 2017), (No date of publication available). See C Agboola ‘Memories of the “inside”: conditions in South African women’s prisons’ (2016) 56 *South African Crime Quarterly* 17, 25.

⁶³ Carolyn Raphaely *Solitary confinement uncovers abuses* The Saturday Star 15 December 2012 available at <https://witsjusticeproject.files.wordpress.com/2014/04/when-perpetrator-becomes-victim-reports-on-torture-in-south-africa.pdf> (date of access 6 March 2017).

⁶⁴ Carolyn Raphaely *Solitary confinement uncovers abuses* The Saturday Star 15 December 2012 available at <https://witsjusticeproject.files.wordpress.com/2014/04/when-perpetrator-becomes-victim-reports-on-torture-in-south-africa.pdf> at pages 28-29 (date of access 6 March 2017).

2.2.2 Assault and humiliation

In the *McCallum case*⁶⁵ a prison warder was murdered by a prisoner. Two days later prison warders entered a section of the prison and ordered about 70 of the male inmates out of their cells. The complainant was assaulted by a prison warder, dislocating his jaw and causing the loss of some teeth. Prisoners were also severely beaten with batons, pickaxe handles, electrical shocking sticks, broom sticks and pool cues.⁶⁶ The complainant and other prisoners were forced to strip naked and had their genitals mocked by approximately 20 female warders. The prisoners were then made to lie prone in a single line while placing their faces in the inner part of the buttocks of the inmate in front of them.⁶⁷ The complainant was also raped by a warder when the warder inserted his baton into the complainant's anus while the same warder stood on the inmate's back to prevent him escaping.⁶⁸

In *S v Malele and Others*,⁶⁹ eight police officials were sentenced for the murder of a taxi driver who the convicted police officials had handcuffed to the back of a police van, the van was then driven off, dragging the victim along the road. The victim succumbed to his injuries, dying later that day in a police cell. While the eventual conviction was for murder, it is submitted that the victim's treatment up to his death was nothing short of torture as he was dragged behind a motor vehicle while wide awake. The experience must have been terrifying and agonising.⁷⁰

⁶⁵ *McCallum v South Africa* heard by the Human Rights Committee CCPR/C/100/D/1818/2008 on 2 November 2010.

⁶⁶ Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 166 state that kicking, whipping, punching or beating are common, while Pekka Saukko and Bernard Knight *Knight's Forensic Pathology* (2004) at pages 302 – 303 add that bars, batons, lengths of tube or hosepipe are also used.

⁶⁷ It is submitted that this is deliberate humiliation of the prisoners and comes close to excrement abuse, see: E Domovitch, P Berger, M J Wawer *et al* 'Human torture: description and sequelae of 104 cases' (1984) 30 *Canadian Family Physician* 827, 829 state that some victims are forced to eat excrement or have it poured over them. See: *Truth and Reconciliation Commission of South Africa Final Report* Volume 2 Chapter 3 (29 October 1998) at para 117 where, for up to six months at a time women were unable to wash and were not provided with sanitary products, even during menstruation.

⁶⁸ *McCallum v South Africa* heard by the Human Rights Committee CCPR/C/100/D/1818/2008 on 2 November 2010 at paras 2.2 – 2.4. See footnote 35 above where sexual abuse is described as a torture method.

⁶⁹ *S v Malele and Others* [2015] ZAGPPHC 793 (11 November 2015).

⁷⁰ See footnotes 36 and 37 above where assault and psychological torture are described.

2.2.3 Electric shocks

In *Mthembu v S*⁷¹ the Court noted that it was common cause that the accused had been tortured by the police while detained. The victim's torture included a severe beating as well as the administration of electric shocks.⁷²

In *Ndlazi v Minister of Safety and Security*⁷³ the Court held that the widow of a recently assassinated man had been tortured by the police in an attempt to secure information regarding the murder from her. The torture included handcuffing the victim before applying a remotely operated waist belt which delivered electric shocks to her.⁷⁴

In a case resulting in the death of an arrested person,⁷⁵ some police officials handcuffed a man to a tree, attached a dynamo device to the victim's nipples by a set of wires, a semi-permeable bag placed over his head and then shocked and beat him with fists until he suddenly went limp.⁷⁶ He had died of asphyxiation during his torture.⁷⁷

2.3 The horizontal threat of torture

The horizontal threat of torture exists and is evident in the severe mental and physical suffering caused to the victims of violence perpetrated by private individuals. The reason for torture in horizontal instances varies. In vigilantism the main reason for committing the torture seems to be the punishment of those suspected of crimes.⁷⁸ Vigilantism refers to the taking of the law into one's own hands and, through breaking the law, punishes someone for a perceived wrong.⁷⁹ The punishment is, as the examples will show, often the cause of severe injuries.

⁷¹ *Mthembu v S* [2008] 4 All SA 517 (SCA).

⁷² *Mthembu v S supra* at para 17.

⁷³ *Ndlazi v Minister of Safety and Security* [2016] JOL 36445 (GNP).

⁷⁴ *Ndlazi v Minister of Safety and Security supra* at para 32.

⁷⁵ *S v Madikane and Others* [1990] 3 All SA 785 (N).

⁷⁶ *S v Madikane supra* at pages 785 – 787.

⁷⁷ *S v Madikane supra* at page 794.

⁷⁸ Torture Act s 3(a)(ii).

⁷⁹ S Juliano 'Superheroes, bandits and cyber nerds: exploring the history and contemporary development of the vigilante' (2012) 7(1) *Journal of International Commercial Law and Technology* 44, 46.

2.3.1 Assault and humiliation

In one case, two men suspected of killing a local trader were severely injured by a group of young men who hacked at them with pangas and beat them with spades.⁸⁰ Some accused were lashed so badly with sjamboks that they were unrecognisable.⁸¹ In another case a suspected robber was beaten with a crowbar for approximately 16 hours before he was stripped naked, painted and then forced to stand on an elevated structure so that the whole community could see the ‘criminal’.⁸²

2.3.2 Xenophobic attacks

The word ‘xenophobia’ is used in common parlance to describe a hatred towards foreigners as well as attacks on such persons.⁸³ The reasons for ‘xenophobic attacks’ are complex.⁸⁴ The victims are discriminated against and targeted for torture on the basis of their nationality.⁸⁵ These victims are targeted and murdered,⁸⁶ violently assaulted,⁸⁷ extorted⁸⁸ and have their possessions left in ruin as they are driven from the communities in which they live.⁸⁹

2.3.3 Sexual violence

The case of *S v Kotze*⁹⁰ demonstrates another case of horizontal torture. The victim was lured

⁸⁰ B Harris ‘“As for Violent Crime that’s our daily bread”: Vigilante violence during South Africa’s Period of Transition’ (2001) 1 *Violence and Transition Series* available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKFwipi8q90e_SAhXJCcAKHQiAAiUQFgggMAE&url=https%3A%2F%2Fwww.csvr.org.za%2Fwits%2Fpapers%2Fpapvtp1.htm&usg=AFQjCNGAEC4FXrXlyHwKyTnLNEEhrIlMnQ&sig2=vI7d4P_NJq_2He-rsyfm9A (date of access 17 March 2017) at page 18.

⁸¹ Harris *Violent Crime* at page 19.

⁸² Harris *Violent Crime* at page 24. See: footnote 31 above where humiliation is highlighted as a torture method.

⁸³ Bronwyn Harris ‘Xenophobia: A New Pathology for a New South Africa’ in D Hook and G Eagle (eds) *Psychopathology and Social Prejudice* (2002) at page 169.

⁸⁴ *Ibid*

⁸⁵ Harris ‘Xenophobia’ *op cit* at page 176

⁸⁶ *Ibid*.

⁸⁷ *Ibid* where in one instance two Senegalese and a Mozambican citizen were thrown from a moving train after they were told that ‘foreigners’ were responsible for the spread of HIV/AIDS and crime. See also Harris ‘Xenophobia’ *op cit* 170 where a Congolese man was stabbed in the abdomen because he was told that foreigners have lots of money.

⁸⁸ Harris ‘Xenophobia’ *op cit* 170 where the same victim was told by his attackers that he was to pay R300 per month or they would kill him. The attackers collected this money monthly, for three years.

⁸⁹ *Ibid* where, for example, Zimbabweans were violently forced out of an area and had their homes razed under the premise that they contributed to high crime rates and were ‘stealing jobs’.

⁹⁰ *S v Kotze and Others* (CC 119/12) [2013] ZAGPPHC217 (15 July 2013).

to her house by her ex-husband and his three accomplices where they attacked her. The Court held that the victim was ‘systematically tortured’⁹¹ by her attackers. The victim’s mouth was taped shut making it difficult for her to breathe, had her nipples twisted by a set of pliers, one nipple was cut off, her pubic hair was ripped out with a set of pliers, she was raped by three men and had to listen to her son beg for his life before he was shot to death.⁹²

2.4 Conclusion

This chapter demonstrates that torture is committed by both state actors and private persons. Both are equally capable of committing the act of torture. The following chapter will investigate whether the constitutional right to be free from torture⁹³ recognises this fact and requires that all persons be protected from torture by the state or private actors.

⁹¹ *S v Kotze supra* at para 7.

⁹² *S v Kotze supra* at para 7.

⁹³ The Constitution s 12(1)(d).

Chapter 3: An interpretation of the constitutional right to be free from torture

3.1 Introduction

The Constitution of the Republic of South Africa, 1996⁹⁴ (the Constitution) provides in the briefly worded s 12(1)(d) that ‘Everyone has the right...not to be tortured in any way’ (right of freedom from torture).⁹⁵ As the Constitution is the highest authority in the Republic of South Africa,⁹⁶ law and conduct inconsistent with the Constitution are invalid and will be rejected by our Courts.⁹⁷ The Torture Act attempts to give effect to the right to be free from torture as contained in the Constitution. It is thus required that the briefly worded right contained in s 12(1)(d) of the Constitution be properly interpreted and understood. The definition of ‘torture’ in the Torture Act must be compared with the constitutional right to determine whether the former is consistent with the Bill of Rights. A literal interpretation of the s 12(1)(d) right to freedom from torture will be provided followed by a purposive interpretation. A purposive interpretation is one where the reason for the law is sought and promoted.⁹⁸ This is dealt with in more detail below.

3.2 Literal interpretation of s 12(1)(d)

The Oxford Dictionary⁹⁹ defines torture as ‘the infliction of severe bodily pain especially as punishment or a means of persuasion; or severe mental or physical suffering.’¹⁰⁰ No mention is made of whether the perpetrator should be affiliated in some way to the state.

Further application of the literal interpretation of the right to be free from torture reveals that it applies to ‘everyone’, without qualification.¹⁰¹ The right thus applies to all persons,

⁹⁴ The Constitution of the Republic of South Africa, 1996.

⁹⁵ The Constitution of the Republic of South Africa, 1996 s 12(1)(d).

⁹⁶ Section 1(c) of the Constitution provides that South Africa is founded on the Supremacy of the Constitution and the rule of law. Section 2 of the Constitution reiterates that the Constitution is the supreme law of the Republic and further provides that law or conduct inconsistent with it is invalid and any obligation imposed by it must be fulfilled. Section 7(2) specifically mentions that the state is to respect, protect and promote the Bill of Rights. The application of the Bill of Rights is in turn dealt with by s 8(2) which provides that it applies horizontally and vertically.

⁹⁷ Christo Botha *Statutory Interpretation an Introduction for Students* 4 ed (2005) at pages 52 – 53.

⁹⁸ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at paras 9 – 10.

⁹⁹ R.E Allen (ed) *The Oxford Concise Dictionary of Current English* 8 ed (1990).

¹⁰⁰ R.E Allen (ed) *The Oxford Concise Dictionary of Current English* 8 ed (1990) at page 1288.

¹⁰¹ The right in the Bill of Rights is phrased as: ‘Everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way’. Currie and de Waal *op cit* at page 50 state that rights

regardless of whether they are tortured by a person connected to the state or a private person with no connection to the state. It is submitted that particular relevance attaches to the words ‘in any way’ in s 12(1)(d) as the words are certain and instructive. The Constitution does not contain any language which limits who the perpetrator or victim of the act of torture may be. It is thus contended that, on a literal interpretation, the Constitution requires that torture may not be committed by non-state actors or those affiliated to the state as this would amount to a ‘way’ in which a person could be tortured.

3.3 Purposive interpretation of s 12(1)(d)

Constitutional interpretation is a purposive exercise.¹⁰² This requires the interpreter to go beyond the literal meaning of the constitutional text to seek out and promote the values which underlie the Constitution.¹⁰³ The Constitution at s 39(1) requires that when interpreting rights in the Bill of Rights international law must be considered.¹⁰⁴

A purposive interpretation also requires that broader contextual factors such as our Apartheid history,¹⁰⁵ the drafting history of Constitution and the constitutional text be considered.¹⁰⁶

3.3.1 Contextual factors

3.3.1.1 Apartheid history

It is trite that Apartheid was a time of massive human rights abuses.¹⁰⁷ While the state took the lead in these abuses, private persons upheld and emulated exclusionist practises of the Apartheid Government.¹⁰⁸ South Africa has been referred to as a country with a culture of

which apply to ‘everyone’ apply without exclusion.

¹⁰² *S v Makwanyane and Another supra* at paras 9 – 10.

¹⁰³ *S v Makwanyane and Another supra* at para 10. Currie and de Waal *op cit* at page 136.

¹⁰⁴ The Constitution s 39(1)(b).

¹⁰⁵ Currie and de Waal *op cit* at page 141

¹⁰⁶ Currie and de Waal *op cit* at page 143.

¹⁰⁷ P de Vos ‘A bridge too far? History as context in interpretation of the South African Constitution’ (2001) *South African Journal of Human Rights* 1, 10 – 12.

¹⁰⁸ A Minnaar *The new vigilantism in Post-April 1994 South Africa: Crime prevention or an expression of lawlessness* Institute for Human Rights and Criminal Justice Studies, Technikon SA (2001) at page 1.

violence.¹⁰⁹ The aetiology of this violence is complex¹¹⁰ but little doubt exists that the violence perpetrated during Apartheid has contributed to the plague of interpersonal violence committed by state and private actors in democratic South Africa.¹¹¹ This violence is contrary to the notion that the Constitution is transformative. The Constitution seeks a new society, a society not based on hatred, violence or the violation of fundamental human rights.¹¹² The s 12(1)(d) right to freedom from torture must be interpreted to promote this transformative vision. All persons must be protected from conduct which amounts to torture, regardless of who the perpetrator of the crime is.

3.3.1.2 *The drafting of the Constitution*

The Technical Committee on Fundamental Rights During the Transition (Technical Committee) was tasked with, among other matters, identifying but not setting the final wording for fundamental rights and freedoms that should be protected during the period when South Africa transitioned from Apartheid to a constitutional democracy.¹¹³ The information gleaned from the Technical Committee is useful in that it can provide context for the interpretation of the Constitution.¹¹⁴ The Technical Committee deliberated, among other things, whether certain rights should operate only between the state and the individual, or also between individuals. The Technical Committee stated that freedom from torture is one of the few rights that is recognised in most countries, internationally and in human rights instruments and thus enjoys unlimited scope and application.¹¹⁵ It is also noted that no limiting language regarding the identity or affiliation of perpetrator or victim of torture is used in any of the formulations of the Technical Committee's right to freedom from torture.¹¹⁶ It is

¹⁰⁹ B Hamber "Have no doubt it is fear in the land." An exploration of the continuing cycles of violence in South Africa' (1999) 12(1) *South African Journal of Child and Adolescent Mental Health* 5, 5.

¹¹⁰ Minnaar *op cit* at page 1.

¹¹¹ Hamber *op cit* 6.

¹¹² De Vos *supra* 9 – 13.

¹¹³ In the Technical Committee on Fundamental Rights During the Transition *First Progress Report* – 14 May (1993) at page 1, the abovementioned Committee was tasked with, among other matters, identifying but not setting the final wording for fundamental rights and freedoms which should be protected in the period during which South Africa transitioned from Apartheid to a constitutional democracy.

¹¹⁴ *S v Makwanyane and Another supra* at para 17.

¹¹⁵ Technical Committee on Fundamental Rights During the Transition *Third Progress Report* – 28 May 1993 at page 8.

¹¹⁶ For instance, see the Technical Committee on Fundamental Rights During the Transition *Second Progress Report* (21 May 1993) at page 4 the Technical Committee stated that freedom from torture is a basic and necessary freedom. The Technical Committee on Fundamental Rights During the Transition *Third Progress Report* (28 May 1993) at page 10 the Technical Committee stated that the freedom from torture is not a right that should be capable of being limited.

submitted that the information in the Technical Committee Reports supports the interpretation that the right to freedom from torture in the Constitution¹¹⁷ applies to all victims, regardless of who the perpetrator is.

3.3.1.3 The constitutional text

The constitutional text itself places the right to freedom from torture separately from the many enumerated rights specifically afforded to arrested, detained and accused persons.¹¹⁸ It is submitted that this positioning of rights should be carefully noted. Torture at the hands of the state is typically effected by its security forces on persons who are accused, detained or arrested,¹¹⁹ yet the drafters of the Constitution kept the right to freedom from torture and those specifically afforded to accused, detained or arrested persons separate. This suggests that the Constitutional Assembly and those who helped formulate the Bill of Rights recognised that torture may well occur outside of the setting where security forces are involved.

¹¹⁷ The Constitution s 12(1)(d).

¹¹⁸ Freedom from torture is contained under s 12 while rights specifically afforded to arrested, accused and detained persons are to be found under s 35 of the Constitution.

¹¹⁹ Hamber *op cit* 6. South African Human Rights Commission *Report on the Prevention and Combatting of Torture of Persons Bill [B21-2012]* (2012) at page 1.

3.3.2 *The right to freedom from torture and international law*

3.3.2.1 *Introduction*

The requirement in the Constitution that international law must be considered¹²⁰ is peremptory¹²¹ and courts have no discretion as to whether or not they consider international law. South African courts are required to consider both binding and non-binding international law when interpreting the Bill of Rights¹²² but are not bound by it.¹²³ Thus while international law will be used in the interpretative process, the final result must be consistent with and dictated by our Constitution.¹²⁴ International law is not the only source of guidance in the interpretation of the Bill of Rights.

Committees and Special Rapporteurs of the United Nations may issue General Comments and Reports on the international instruments they are charged with overseeing. These are useful in that they provide an insight into how those instruments are being interpreted by these bodies.¹²⁵ At best these Reports and Comments can add persuasive value to an argument and are not authority.¹²⁶

3.3.2.2 *Torture in international law*

Not only is torture prohibited by many international instruments,¹²⁷ it is regarded a crime

¹²⁰ The Constitution s 39(1)(b).

¹²¹ *S v Makwanyane and Another* *supra* at para 37.

¹²² *S v Makwanyane and Another* *supra* at p 686, para 35. Chaskalson P refers to Dugard John 'International Human Rights' in Dawid van Wyk *et al* (eds) *Rights and Constitutionalism: the New South African Order* (2014) at pages 192 – 195 where the author provides that international law includes all sources of law provided for by the Statute of the International Court of Justice (1946) article 38(1), those being:

- a) 'International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognised by civilized nations; [and]

... judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary for the determination of rules of law.'

¹²³ *S v Makwanyane* *supra* at paras 37 and 39.

¹²⁴ *S v Makwanyane* *supra* at para 39.

¹²⁵ John Dugard *International Law: A South African Perspective* (2013) at page 61.

¹²⁶ See footnote 122 where the Constitutional Court set out what qualifies as binding international law and what does not.

¹²⁷ For instance: the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT), A/RES/39/64 (1984) at article 1, the Rome Statute of the International Criminal Court A/CONF.183/9 (2002) (Rome Statute) at article 7(2)(e); and the International Covenant on Civil and Political Rights UN Doc. A/6316 (1966) at article 7.

under customary international law and has the value of *jus cogens*,¹²⁸ which means it is a norm of international law which may not be departed from.¹²⁹ That a specific crime of torture has been created in international law is perhaps indicative of the international legal communities' condemnation of the crime.¹³⁰ The position of various international bodies charged with the monitoring and implementation of instruments banning torture are discussed.

3.3.2.3 *The United Nations Committee against Torture and the United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment*¹³¹

The United Nations Committee Against Torture (CT) is an independent body which is charged with the implementation and monitoring of compliance with the United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (UNCAT).¹³² The UNCAT is the primary international instrument aimed at preventing and combatting torture.¹³³

The UNCAT defines torture as:

'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not

¹²⁸ *Filártiga v Peña Irala* 630 F 2d 876 (2d CIR 1980) at p 886 available at <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf> (date of access 7 November 2015); *Al-Adsani v The United Kingdom* Application No. 35763/97, 21 November 2001 European Court of Human Rights at para 61.

¹²⁹ Dugard *International Law: A South African Perspective op cit* at pages 38 – 39.

¹³⁰ The Rome Statute at article 7(1)(f) regards torture as a crime against humanity and UNCAT at article 2(1) requires member states to take effective measures to combat the crime.

¹³¹ South Africa ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, A/RES/39/64 (1984) on 10 December 1998 https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en (date of access 7 November 2015).

¹³² Office of the High Commissioner on Human Rights webpage under the undated section 'about us' <http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> (date of access 11 July 2016).

¹³³ Dugard *International Law: A South African Perspective* (2013) at page 419.

include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’¹³⁴

The definition of torture in both the Torture Act¹³⁵ and the UNCAT require the perpetrator to be ‘a public official or other person acting in an official capacity.’ The CT has interpreted the term ‘official capacity’ to mean that any private person acting in a capacity normally fulfilled by the state is considered to be acting in an ‘official capacity’.¹³⁶ The UNCAT, then, indirectly provides for the prohibition of torture by private persons, yet a link between perpetrator and the state is required. However, in the same General Comment the CT states that:

‘The Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum.’¹³⁷

It is submitted that this may be interpreted as the CT demonstrating an attitude where a constitution such as the South African Constitution is not discouraged from broadening the application of the right to be free from torture by requiring that any state or non-state actor may in the defined circumstances, be guilty of torture.

The CT provides further guidance on the elimination of torture which may be seen as supporting a horizontal application of the right to be free from torture. In terms of the UNCAT:

‘The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and

¹³⁴ UNCAT article 1.

¹³⁵ Both definitions follow almost exactly the same wording. Unlike the UNCAT, the Torture Act provides that torture also applies to acts any person is planning to commit, and to situations where the perpetrator uses torture to intimidate or coerce any person to refrain from doing anything. The Torture Act then only differs from the UNCAT in that it extends the crime of torture to more situations than the UNCAT, but does not change who the perpetrator may be.

¹³⁶ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 17. The example provided in para 17 is a privately run detention facility.

¹³⁷ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 9.

its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.¹³⁸

A state must thus act strongly against any person, private or state, if a state related person has even reasonable grounds to believe that such person is committing torture.

Furthermore the CT argues that this requires states to, *inter alia*, be cognizant of the ever evolving nature of torture and to adapt methods of combatting the new threats as they appear.¹³⁹ It is contended that the use of the words 'evolving' and 'new threats' creates the possibility that the meaning of torture on a domestic or international plane could be extended to recognise torture committed by private actors with no link to the state, as this would amount to an evolution of torture and a new threat created by torture. This strengthens the argument that torture should not be limited to state - linked actors.

*3.3.2.4 The United Nations Human Rights Committee and the International Covenant on Civil and Political Rights*¹⁴⁰

The United Nations Human Rights Committee (HRC) is charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR).¹⁴¹ The ICCPR bans torture in less words than the UNCAT¹⁴² or the Torture Act.¹⁴³ It simply provides in article 7 that: 'no one shall be subjected to torture.'¹⁴⁴ The ICCPR, through its brief exposition of the right to be free from torture results in a right which does not limit the

¹³⁸ UNCAT article 2(1).

¹³⁹ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 4.

¹⁴⁰ South Africa ratified the ICCPR on 10 December 1998

https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (date of access 9 November 2015).

¹⁴¹ <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (date of access 4 March 2017).

¹⁴² UNCAT article 1.

¹⁴³ Section 3.

¹⁴⁴ ICCPR article 7.

prohibition of torture to a specific perpetrator.

General Comment No. 20¹⁴⁵ of the HRC states that:

‘it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.’¹⁴⁶

Article 7 is to be understood as preventing torture perpetrated by the state and by persons acting in their private capacity.

In the view of the HRC, the ban on torture is thus more extensive than definitions of torture in the UNCAT and the Torture Act in that it explicitly encompasses private perpetrators regardless of any connection to the state. South Africa has ratified both the ICCPR and the UNCAT. The resulting difference in interpretation of the two treaties on the subject matter of torture is easily solved as the UNCAT provides that it does not prejudice any other international instrument which contains provisions with wider application.¹⁴⁷ The HRC’s view should thus prevail over that of the CT on who may be held liable for torture as the former is far wider in application than the latter. It is submitted that the HRC’s call for non-state actors to be held liable for torture is part of the necessary evolution of our understanding of torture and supplements the CT’s General Comment that states should be aware of and adapt to the ever evolving crime of torture.¹⁴⁸

¹⁴⁵ Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44th Session (1992).

¹⁴⁶ Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44th Session (1992) at para 2. The progressive approach taken by the HRC is evident in its case law, for instance in: *M.T. v Uzbekistan* Communication No. 2234/2013, CCPR/C/114/D/2234/2013, 21 October 2015 at paras 7.2 and 7.4 the HRC held that the forced sterilization of a woman amounted to torture as it caused severe mental and physical suffering. In *Slimane Mechani v Algeria* Communication No. 1807/2008, CCPR/C/107/D/1807/2008, 19 June 2013 at para 8.5. the HRC held that the mental anguish caused to a father by the forced disappearance of his son amounted to torture.

¹⁴⁷ UNCAT article 1(2).

¹⁴⁸ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 4.

3.3.2.5 *The Rome Statute of the International Court of Justice*¹⁴⁹

The Rome Statute of the International Criminal Court (Rome Statute)¹⁵⁰ defines torture as:

“Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;’¹⁵¹

The Rome Statute recognises that torture may be perpetrated against a person in custody, which seemingly implies some sort of custodial authority would, at the least, be allowing the torture to occur. The Rome Statute also provides that the victim may be ‘under the control of the accused’, that being, the person accused of torture. It is submitted that the broad language used in this section of the definition of torture opens up the possibility that torture may be interpreted to incorporate anyone who tortures someone else before handing them over to custodial authorities. It has been reported that a form of vigilantism in South Africa involves community members catching, attacking and severely injuring a suspected criminal before handing them over to the police.¹⁵² It is submitted that in some cases the severity of ‘punishment’ meted out before handing the victim over to the police may amount to torture.

3.3.2.6 *The World Medical Association’s Declaration of Tokyo*¹⁵³

The World Medical Association’s (WMA) Declaration of Tokyo (Declaration of Tokyo)¹⁵⁴ provides ethical guidelines for doctors relating to torture. The Declaration of Tokyo defines torture in its Preamble as:

‘Torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.’

The Declaration of Tokyo recognises that the perpetrator may be a private person or someone

¹⁴⁹ Rome Statute of the International Criminal Court A/CONF.183/9 (2002).

¹⁵⁰ *Ibid.*

¹⁵¹ Rome Statute article 7(2)(e).

¹⁵² A Minnaar *op cit* at page 3.

¹⁵³ World Medical Association Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (1975).

¹⁵⁴ *Ibid.*

in authority. This is indicated through the words ‘...one or more persons *acting alone* (authors emphasis) or on the orders of any authority’. It is submitted that this is a recognition of the horizontal application of the right to be free from torture and that the offence may be perpetrated by a private person such as a private doctor acting outside of any connection to the state.¹⁵⁵ This is in line with the views expressed by the HRC and, it is submitted, the CT.¹⁵⁶

3.4 Conclusion

A literal interpretation of s 12(1)(d) indicates that torture can be committed by anyone and that torture in any way is prohibited. This literal interpretation where any torture committed by anyone against another person is also bolstered by a purposive interpretation of the same right.

International law is clear - torture by a state is prohibited. While the CT does not explicitly prohibit torture by private persons, the UNCAT is capable of such an interpretation. In contrast to this less certain application of the crime of torture, the HRC requires that all persons, even those not connected to the state, be held responsible for acts amounting to torture. The Declaration of Tokyo and the Rome Statute echo a similar sentiment to that of the interpretation given by the HRC. The answer to the question of whether torture applies to both state and non - state actors is, it is submitted, heavily in favour of a horizontal application of the crime.

The Torture Act limits its application to perpetrators who are ‘public officials or anyone else acting in an official capacity.’ This will be interpreted literally and purposively in the following chapter.

¹⁵⁵ Declaration of Tokyo Preamble.

¹⁵⁶ See: text above at pages 29 – 31 where these views are detailed.

Chapter 4: A purposive interpretation of ‘a public official or other person acting in an official capacity’

4.1 Introduction

The South African Constitutional Court requires a purposive interpretation of legislation.¹⁵⁷ This means that when the purpose of the legislation is sought,¹⁵⁸ such a purpose must be consonant with the right to be free from torture as set out in Chapter 3 of this dissertation.

4.2 Literal interpretation

Section 1 of the Prevention and Combatting of Torture of Prsons Act 13 of 2013 (Torture Act) defines a public official as ‘any person holding public office and exercising or purporting to exercise a public power or a public function in terms of any legislation’. It is submitted that the term ‘public official’ seemingly excludes all private persons from its definition.

Section 1 of the Torture Act does not define ‘official capacity’, thus the ordinary meaning is to be sought in dictionaries and court decisions.¹⁵⁹

‘Official’ may mean ‘relating to an office’, ‘a characteristic of officials and bureaucracy’, ‘employed in a public capacity’, ‘a person holding office or engaged in official duties’. The examples of a presiding officer or a bishop are given.¹⁶⁰

Capacity may mean ‘the power to receive, hold or retain’.¹⁶¹ It may also mean ‘a legal

¹⁵⁷ *Bertie van Zyl (Pty) Ltd & another v Minister for Safety and Security & others* 2010 (2) SA 181 (CC) at para 21 where the Court stated: ‘Our Constitution requires a purposive approach to statutory interpretation.’

¹⁵⁸ Botha *op cit* 54, N Smith ‘The purposes behind the words’ (1996) 12 *South African Journal on Human Rights* 90, 93-94 provides that the point of a purposive interpretation is to determine the point of the legislation not the meaning of the words. This comment should be seen in light of the Courts decision in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at paras 23 and 24 where the court required an interpretation that was not ‘unduly strained’ and which could reasonably be ascribed to the text.

¹⁵⁹ Botha *op cit* 86.

¹⁶⁰ R E Allen (ed) *The Oxford Concise Dictionary of Current English* 8 ed (1990) at page 824.

¹⁶¹ Bryan Garner *A Dictionary of Modern Legal Usage* 2 ed New York: Oxford University Press (1995) at page 129.

competence, a faculty or talent, a position or function'.¹⁶²

South African courts have used the term 'official capacity' in a flexible fashion and have not confined it to mean a public official. For instance, in *President of RSA & others v M & G Media Ltd*¹⁶³ the Court referred to the first appellant as the President of the Republic of South Africa cited in his official capacity as President of the Republic of South Africa, a state actor, whereas in *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*¹⁶⁴ the court referred to the Presiding Bishop in his official capacity as the presiding Methodist Bishop for South Africa, a non-state actor.

4.3 Purposive interpretation

4.3.1. Preamble

The Preamble to the Torture Act provides that the legislation seeks to give effect to South Africa's commitments under the United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (UNCAT).¹⁶⁵ This supports the view that the purpose of the Torture Act is to prevent state-linked torture as the UNCAT has been interpreted to extend the crime of torture to private persons acting in a capacity normally fulfilled by the state.¹⁶⁶

The Preamble adds that the Republic of South Africa seeks to make a break from its past where torture was commonplace. Whether this refers to only state sanctioned torture or includes torture by private persons in South Africa's past is not clear. The Parliamentary debates on the Prevention and Combatting of Torture of Persons Bill (the Bill) shed some light on what Parliament intended by the drafting of the Bill and what the Preamble of the Bill

¹⁶² R E Allen (ed) *The Oxford Concise Dictionary of Current English* 8 ed (1990) at page 165.

¹⁶³ *President of RSA & others v M & G Media Ltd* 2015 (1) SA 92 (SCA) at para 1.

¹⁶⁴ *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151 (29 September 2014) at para 50.

¹⁶⁵ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, A/RES/39/64 (1984).

¹⁶⁶ See: text above at page 29 where this view is discussed in more detail.

is referring to when it mentions torture.

4.3.2. *Parliamentary debates*

During the Second Reading of the Bill, the Minister of Justice and Constitutional Development (the Minister) stated that the Preamble specifically mentions that the purpose of the Bill is to give effect to South Africa's obligations under the UNCAT to prevent state linked torture.¹⁶⁷ The 'clearest route' to make sure South Africa complies with these obligations follow the definition of 'torture' in the UNCAT.¹⁶⁸ It is submitted that this is clear reference to the fact the UNCAT provides that the offence of torture is a crime committed by state linked persons only.¹⁶⁹

In discussing the Preamble to the Bill, the Minister made reference to South Africa not repeating our 'shameful history of human rights abuses'.¹⁷⁰ That this refers to South Africa's state sanctioned torture of persons is made clear by the explicit rejection of the idea that the Bill should create a crime which applies to non-state actors. Non-state actors or private persons are to be dealt with under the common law¹⁷¹ and criminal legislation¹⁷² when committing acts which meet the definition of torture.

4.3.3. *Reports*

The South African Human Rights Committee (SAHRC) submitted a Report (the Report) on the Prevention and Combatting of Torture of Persons Bill (the Bill)¹⁷³ to the Portfolio

¹⁶⁷ The Prevention and Combatting of Torture of Persons Bill (Second Reading Debate) National Assembly 14 November 2012 at pages 1, 5, and 6.

¹⁶⁸ Prevention and Combating of Torture of Persons Bill [B21-2012]: briefing by Department of Justice and Constitutional Development 12 June 2012 at page 3 available at <https://pmg.org.za/committee-meeting/14555/#s87694650> (date of access 7 December 2017).

¹⁶⁹ See discussion on the UNCAT on pages 28 - 30 of this dissertation.

¹⁷⁰ The Prevention and Combatting of Torture of Persons Bill (Second Reading Debate) National Assembly 14 November 2012 at page 1, 5, and 6.

¹⁷¹ The Prevention and Combatting of Torture of Persons Bill (Second Reading Debate) National Assembly 14 November 2012 at page 8.

¹⁷² National Council of Provinces, Security and Justice *Prevention and Combating of Torture of Persons Bill [B21B-2012]: deliberations; Reports on Magistrates Ndamase, Dumani and Ntuli NCOP Security and Justice* (20 May 2013) at page 2 available at <https://pmg.org.za/committee-meeting/15878/> (date of access 6 December 2017). National Council of Provinces, Security and Justice *Prevention and Combating of Torture of Persons Bill [B21-2012]: public hearings Justice and Correctional Services* (03 September 2012) at page 4 available at <https://pmg.org.za/committee-meeting/14822/#s87734929> (date of access 3 December 2017).

¹⁷³ South African Human Rights Commission *Report on the Prevention and Combatting of Torture of Persons*

Committee on Justice and Constitutional Development.¹⁷⁴ The SAHRC noted with concern that the definition of torture contained in the Bill differed from that in the definition of torture contained in the UNCAT, article 1. The difference lay in the fact that the Bill omitted the words ‘with the consent or acquiescence of a public official or other person acting in that capacity’. The SAHRC argued that confining the proposed anti-torture legislation to those cases where the state actually knew of the torture excluded those cases where the state should have known about the torture and this ignored the real needs of our society.

The SAHRC cited the large private security industry in South Africa as one example of where its recommendation that the definition of ‘torture’ be brought in line with the UNCAT definition of torture by including the phrase ‘with the consent or acquiescence of a public official or other person acting in that capacity’ as the private security industry is a place where torture of persons suspected of crimes is likely. The SAHRC indicated that this would make a positive impact on human rights and prevent torture¹⁷⁵ as the security industry often acts in place of the South African Police Services.

The purpose of the legislation is thus to prevent torture when the state should have known about the torture. This is in line with the Committee on Torture (CT) and its General Comment 2¹⁷⁶ where it was stated that a person may be considered to be a perpetrator of torture if he or she executed the defined conduct while acting in a capacity normally fulfilled by the state. The final result is that Parliament did eventually include the section identified as missing by the SAHRC in the final definition of torture in the Torture Act.¹⁷⁷

It is respectfully contended that it is regrettable that the SAHRC saw fit to stop where it did with its recommendations, for, as pointed out above, the UNCAT provides that it applies as a minimum, a base from which to grow anti-torture law.¹⁷⁸ Indeed the SAHRC stated that the drafters of the UNCAT explicitly excluded private persons from the definition.¹⁷⁹ This was a prime opportunity to recognise that the Human Rights Committee (HRC) advocates for all

Bill [B21-2012] (2012) at page 13.

¹⁷⁴ Botha *op cit* 83 states that such reports may be of use in determining the purpose of the legislation.

¹⁷⁵ South African Human Rights Commission *op cit* at page 13.

¹⁷⁶ See: pages 29 above.

¹⁷⁷ Torture Act s 3.

¹⁷⁸ UNCAT article 1(2).

¹⁷⁹ South African Human Rights Commission *op cit* at page 13.

persons to be held liable for torture, regardless of their affiliation to the state.¹⁸⁰

4.4 Conclusion

It is submitted that a literal and purposive interpretation of the term ‘public official or any other person acting in an official capacity’ shows that private persons are excluded as perpetrators by the Torture Act.

In Chapter 3 it was shown that the right to be free from torture extends to all persons. This is supported by international law.¹⁸¹ As the Torture Act only prohibits torture by state-linked persons, but does not exclude persons who are the victims of private instances of torture from pursuing civil and criminal law remedies under the South African Common Law it is not necessarily unconstitutional. It is submitted that the legislation is constitutional because it does not limit persons seeking remedies under other criminal laws for private instances of torture. At most, the failure to codify the specific crime of torture in all instances of private and public torture is a breach of our international obligation under the International Covenant on Civil and Political Rights.¹⁸²

¹⁸⁰ Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44th Session (1992) at para 2.

¹⁸¹ See: text above at pages 29 – 31 where these views are detailed.

¹⁸² The Torture Act mentions in its Preamble that the purpose of the legislation is to give effect to South Africa’s international obligations under the UNCAT but, it is contended that Parliament regrettably ignores the interpretation of ‘torture’ by the Human Rights Committee where private instances of Torture are prohibited, see: Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44th Session (1992) at para 2. The progressive approach taken by the HRC is evident in its case law, for instance in: *M.T. v Uzbekistan* Communication No. 2234/2013, CCPR/C/114/D/2234/2013, 21 October 2015 at paras 7.2 and 7.4 the HRC held that the forced sterilization of a woman amounted to torture as it caused severe mental and physical suffering. In *Slimane Mechani v Algeria* Communication No. 1807/2008, CCPR/C/107/D/1807/2008, 19 June 2013 at para 8.5. the HRC held that the mental anguish caused to a father by the forced disappearance of his son amounted to torture. South Africa’s commitment comes with the signing and ratifying of the ICCPR on 10 December 1998 footnote 140 above. The Preamble to the ICCPR provides that member states agree to the contents of the ICCPR and Article 2(2) states that member states agree to protect the rights contained in the ICCPR.

Chapter 5: Remedies available to victims of private instances of torture

5.1 Introduction

Since the right to be free from torture¹⁸³ applies to all persons, regardless of whether the perpetrator is affiliated to the state or not¹⁸⁴ and since the Torture Act only criminalises ‘torture’ by state-linked persons,¹⁸⁵ it will be shown that exact same conduct which amounts to torture under the Torture Act can be punished under South African criminal laws applicable to private persons and state-linked persons alike.¹⁸⁶ Both state-linked persons and private individuals are equally capable of committing conduct which amounts to torture,¹⁸⁷ the distinction lies in who the legislation holds responsible for which crime. Thus reference will be made interchangeably between conduct of state and private persons in the discussion below. The definition of torture in the Torture Act is used as this legislation criminalises a particular form of criminal conduct and must thus be distinguished from other forms of criminal conduct.¹⁸⁸ This first requires the definition of ‘torture’ in the Torture Act to be elaborated on.

The crimes discussed below are not intended as a complete list of possible criminal charges which may be brought against a person accused of private instances of torture but do cover the instances of torture in the cases discussed above.¹⁸⁹ As torture methods are limited only by the human imagination¹⁹⁰ it is possible that this chapter does not cover all crimes which amount to private instances of torture.

There is a great deal of overlap between the crimes discussed below in that one specific act may result in several different criminal charges. These charges are referred to as competent

¹⁸³ The Constitution s 12(1)(d).

¹⁸⁴ See Chapter 3 where the constitutional right to freedom from torture is interpreted.

¹⁸⁵ See Chapter 4 where the definition of ‘torture’ in the Torture Act is interpreted.

¹⁸⁶ The National Prosecuting Authority Act 32 of 1998 s 20(1) provides that in South Africa the discretion to decide on which charges to bring against an accused is in the mandate of the National Prosecuting Authority and is exercised through its functionaries.

¹⁸⁷ As defined in in the Torture Act s 3.

¹⁸⁸ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 11.

¹⁸⁹ See Chapter 2 where specific instances of torture are detailed.

¹⁹⁰ Mahomed Ayob Dada, Kirasi Alex Olumbe, David Jan McQuoid-Mason *Concise Text and Manual of Forensic Medicine, Medical Law and Ethics in East Africa* (2005) at page 166.

verdicts and refer to a charge which is supported by the evidence.¹⁹¹

5.2 Definitional elements of torture

5.2.1 Culpability

Torture is an intentional act. *Dolus eventualis* may suffice.¹⁹² The intention of torture is to cause severe mental or physical suffering. Attacks on the mind and body of the victim are equally protected.¹⁹³

5.2.2 Conduct

Conduct amounting to torture may be in the form of positive conduct or an omission.¹⁹⁴

5.2.3 Purpose

Torture is committed for the express purposes of:

‘(a) for such purposes as to —

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person has committed, is suspected of

¹⁹¹ Criminal Procedure Act 51 of 1977 s 270.

¹⁹² The United Nations Voluntary Fund for the Victims of Torture *The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) (date of access 17 March 2017) at page 4 where it is stated in reference to intention that torture probably requires at least recklessness, but not negligence. See C R Snyman *Criminal Law* 5th ed (2008) at pages 186-188; Jonathan Burchell and John Milton *Principles of Criminal Law* 3rd ed (2006) at pages 481 – 487 who state that while South African Courts currently require recklessness as a component of *dolus eventualis*, the current position is untenable as the inquiry should be limited to whether or not the accused foresaw a real possibility of the prohibited result materialising. If the accused did not have this foresight then they are guilty of conscious negligence. This is a form of negligence where an accused foresees a remote possibility of the prohibited result ensuing, but proceeds nonetheless.

¹⁹³ For instances of positive conduct see: sexual torture at footnote 35 and R Schechter ‘Intentional starvation as torture: exploring the grey area between ill treatment and torture’ (2002 – 2003) 18 *American University International Law Review* 1233, 1237 for an example of an omission amounting to torture in the form of omitting to feed a detainee for extended periods.

¹⁹⁴ The United Nations Voluntary Fund for the Victims of Torture *The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) (date of access 17 March 2017) at pages 3 – 4.

- having committed or is planning to commit; or
- (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or
- (b) for any reason based on discrimination of any kind'.¹⁹⁵

Conduct which is not committed for any of the above reasons is not torture¹⁹⁶ but may still be punished under South African statutory crimes or common law if it meets the requirements for those laws.¹⁹⁷ This chapter will set out several statutory and common law crimes which, for the purposes of avoiding repetition, are assumed to have been committed for one of the reasons set out above in this section.

5.2.4 Severity

Torture is an 'aggravated form of inhuman treatment causing intense physical and or mental suffering',¹⁹⁸ and is to be distinguished from less severe forms of maltreatment such as cruel, inhuman or degrading treatment.¹⁹⁹ Each case is judged on its own merits²⁰⁰ but factors which aggravate suffering are more likely to result in a finding of torture. One of the single most important factors in assessing severity is the extent of the victim's powerlessness.²⁰¹ The courts will also consider the intensity of suffering inflicted; the negative physical and mental effects on the victim; the duration, manner and method of carrying out the crime; as well as

¹⁹⁵ Torture Act s 3.

¹⁹⁶ The United Nations Voluntary Fund for the Victims of Torture *The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) (date of access 17 March 2017) at page 4.

¹⁹⁷ Snyman *op cit* at page 30.

¹⁹⁸ *Ireland v United Kingdom* Application No. 5310/71, 18 January 1978, European Court of Human Rights at Part A, Separate Judgement of Judge Zekia.

¹⁹⁹ The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) (date of access 17 March 2017) at page 7.

²⁰⁰ *Ibid.* L Muntingh *Guide to the UN Convention against torture in South Africa* Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape (2011) at page 19.

²⁰¹ The United Nations Voluntary Fund for the Victims of Torture *The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) (date of access 17 March 2017) at page 7. In B E Aguirre 'Dialectics of Vulnerability and Resilience' (2007) 14 *The Georgetown Journal on Poverty Law and Policy* 42, 42 it is stated that vulnerability is sometimes the function of a power imbalance, the victim being less able to negotiate their desires or needs due to being in a more vulnerable position when compared to the dominant party. Synonyms for vulnerable include weak and exposed to harm. See *S v Madikane supra* 795. In P Eastaer and D Emerson-Elliott 'Domestic violence and marriage like relationships: Social security law at the crossroads' (2009) 34(3) *Alternative Law Journal* 173, 173 the authors state that victims in violent domestic relationships are vulnerable in that they are unlikely to seek outside help as they feel terrorized, have low self-esteem and may feel that if they leave, the violence will intensify.

the age, sex and state of health of the victim.²⁰² Further factors to be considered include the amount of repetition of a particular conduct as well as the likelihood of long and short term physical, mental and psychological effects on the victim.²⁰³ The Torture Act contains similar considerations as aggravating factors in determining the appropriate sentence for those convicted of torture.²⁰⁴

It is observed that torture often involves the commission of several statutory or common law crimes.²⁰⁵ It is contended that the mental and physical suffering caused by cumulative effects of several less severe crimes may result in a finding that the severity requirement for torture has been met. Similarly, there is a great deal of overlap between the crimes discussed below in that one act may result in the definitional requirements for two or more crimes being satisfied. In such a case the perpetrator may be charged with all of the offences, but may not be convicted of more than one offence if the charges amount to the same punishable offence.²⁰⁶ If there are a series of crimes, the judicial officer may convict the accused of the various offences. This is a matter for the discretion of the judicial officer.²⁰⁷

²⁰² *Ireland v United Kingdom* Application No. 5310/71, 18 January 1978, European Court of Human Rights at paras 162 and 175. *Selmouni v France* Application No. 25803/94, 28 July 1999 European Court of Human Rights at para 160. *Mukoko v Attorney General* [2012] JOL 29664 ZS at page 13.

²⁰³ *Ireland v United Kingdom* Application No. 5310/71, 18 January 1978, European Court of Human Rights at Part A, Separate Judgement of Judge Zekia.

²⁰⁴ Section 5 provides that a court should consider any discrimination against the victim, the state of mental and physical health of the victim, any disabilities the victim may have had when they were tortured, whether the victim was under the age of 18, whether the torture was a sex crime in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, if any weapon was used, whether any physical or mental harm was inflicted, the detention conditions where the victim was held, the role of the offender, the offenders previous convictions for similar offences and the physical and psychological consequences on the victim.

²⁰⁵ See for instance: *McCallum v South Africa supra* at footnote 65 where the victim was severely assaulted and raped.

²⁰⁶ J J Joubert (ed) *Criminal Procedure Handbook* 9 ed (2010) at page 195.

²⁰⁷ Joubert *op cit* 196 – 197.

5.3 Types of crimes

5.3.1 Assault

Assault may be defined as unlawful and intentional conduct which directly or indirectly impairs the physical integrity of a victim, or inspires the belief that the victim's physical integrity is in immediate peril. Assault is graded and a person may be convicted of a more serious form of assault, for instance, assault with the intention to do grievous bodily harm. The existence of this aggravated form of assault is determined factually and does not depend on the victim's eventual physical injuries, although they may be a factor taken into consideration.²⁰⁸ It is submitted that to meet the severity requirement for torture, the crime would likely need to amount to assault with intention to do grievous bodily harm, although the focus should be on the severity of the assault with reference to the guidelines for the severity of torture set out above, and not the requirements for assault with intention to do grievous bodily harm. In Chapter 2, details of torture which also amount to assault involving electric shocks,²⁰⁹ beatings,²¹⁰ having teeth²¹¹ or pubic hair ripped out,²¹² asphyxiation²¹³ and threatening to shoot a person²¹⁴ were given. It is contended that in each of these cases the severity requirement for torture would be met as the victims were helpless and vulnerable in that they were entirely at the mercy of their attackers, the crimes committed were particularly painful²¹⁵ and in some instances, the attacks were prolonged and repeated.²¹⁶

5.3.2 Pointing of a firearm

Intentionally pointing a firearm at a victim such that the victim believes that the firearm may be discharged at them is a crime under the Firearms Control Act.²¹⁷ It is submitted that this

²⁰⁸ *Snyman op cit* at page 462.

²⁰⁹ In *S v Madikane supra* at footnote 75 the Court held at pages 789 and 795 that the shocks delivered to the accused amounted to assault with intention to do grievous bodily harm and prolonged torture.

²¹⁰ See: pages 16-19 and footnote 32 above where this torture method is described in more detail.

²¹¹ See: footnote 33 above where this torture method is described in more detail.

²¹² *S v Kotze supra* at page 22.

²¹³ See: footnote 36 above where this torture method is described in more detail.

²¹⁴ See: footnote 37 above where this torture method is described in more detail.

²¹⁵ Such as having her nipple cut off see *S v Kotze supra* at this dissertation's page 22, footnote 90 where the court specifically mentioned that the victim was systematically tortured.

²¹⁶ See: page 21 above where a man was beaten with a crowbar for approximately 16 hours.

²¹⁷ Act 60 of 2000 s 120(6)(b).

crime created by the Firearms Control Act²¹⁸ may serve as an aggravating factor in the commission of other offences such as kidnapping, sex crimes and assault which may result in the severity threshold being crossed.²¹⁹

5.3.3. Sex crimes

The Criminal Law (Sexual Offences and Related Matters) Amendment Act codifies various sex offences all which require intention as a form of culpability. Some of the offences are rape,²²⁰ compelled rape,²²¹ sexual assault,²²² compelled sexual assault²²³ and compelled self-sexual assault²²⁴ (referred to as sex crimes in this section). These may occur in the in the context of torture.²²⁵

Rape dehumanizes and devalues the victim who is forced to witness their attacker deriving pleasure from their suffering.²²⁶ Rapists intrude into their victim's most private body spaces.²²⁷ Rape frequently occurs without any other violence as the victim is often too

²¹⁸ Act 60 of 2000.

²¹⁹ See: footnote 35 above.

²²⁰ Act 32 of 2007 provides that rape is the intentional and unlawful sexual penetration of a person without their consent. Sexual penetration is defined in s 1 of Act 32 of 2007 to mean the placing of any part of a person or animal, or any object into or beyond the genital organs, anus or mouth of the victim.

²²¹ Act 32 of 2007 s 4 provides that compelled rape is when a person intentionally and unlawfully compels a third party to sexually penetrate a person without their consent.

²²² Act 32 of 2007 s 5 deals with sexual assault which is either the intentional and unlawful sexual violation of a victim, or the inspiring of a belief in a victim that they are going to be sexually violated. Sexual violation is defined to mean the 'direct or indirect contact between the - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal; mouth of one person and- (aa) the genital organs or anus of another person or, in the case of a female, her breasts; (bb) the mouth of another person; (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could- (aaa) be used in an act of sexual penetration; (bbb) cause sexual arousal or stimulation; (ccc) or be sexually aroused or stimulated thereby; or (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or (iii) mouth of the complainant and the genital organs or anus of an animal; 1. (b) the masturbation of one person by another person; or 2. (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.'

²²³ Act 32 of 2007 s 6 provides that this is the unlawful and intentional compelling of a third party to perform an act of sexual violation on the victim without the victim's consent.

²²⁴ Act 32 of 2007 provides that compelled self-sexual assault means 'A person ('A') who unlawfully and intentionally compels a complainant ('B'), without the consent of B, to 1 (a) engage in - (i) masturbation; (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or (iii) sexually suggestive or lewd acts, with B himself or herself; (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault.'

²²⁵ See: *S v Kotze supra* at this dissertation's page 22.

²²⁶ M Isac 'Some psychological reactions of rape victims' (1992) 11 *Medicine and Law* 303, 305.

²²⁷ Isac *op cit* 306.

frightened to fight back for fear of provoking the attacker into further violence.²²⁸ However, it has been stated that rape is no less a ‘violent and traumatic event’ for the victim simply because physical violence is absent.²²⁹ Rape may also be part of a brutal attack.²³⁰ The negative psychological consequences of rape on survivor are often long term and severe.²³¹ Rape is such a severe crime that it is regarded as torture if it meets the requirements that it be committed by a state-linked official and that it is perpetrated to achieve the specific ends set out in the definition of torture.²³² It has been shown that, in regard to torture, there can be no legitimate distinction between the conduct of state-linked individuals and private persons.²³³ Rape is then, on its own and for the purposes of torture, severe enough to satisfy the severity requirement in the definition of torture. If the rape meets the other definitional elements of torture, it amounts to torture, regardless of whether the perpetrator is state-linked or private.

In all of the crimes described in Sexual Offences Act²³⁴ the victim is, without their consent, forced into giving up their most intimate physical spaces for the pleasure of their assailant. Sex crimes are most often committed by persons known to the victim.²³⁵ It is submitted that in at least some cases of sexual assault the assailant uses the relationship of familiarity and trust shared with their victim to advance their aim in committing the sex crime.²³⁶ Sex crimes may also be committed against victims who are financially dependant on the assailant. The

²²⁸ M Kaplan ‘Rape beyond crime’ (2016 – 2017) 66 *Duke Law Journal* 1045, 1056.

²²⁹ *S v SMM* 2013 (2) SACR 292 (SCA) at para 12.

²³⁰ R Koraan and A Geduld ‘“Corrective rape” of lesbians in the era of transformative constitutionalism in South Africa’ (2015) 18(5) *Potchefstroom Electronic Law Journal* 1931 at pages 1938 & 1939 see for instance: the phenomenon of ‘corrective rape’ where homosexual females are raped by males in the belief that homosexuality is wrong and can be cured by heterosexual intercourse, even if it amounts to rape executed with extreme violence.

²³¹ L F Lowenstein ‘Rape: Recent psychological research into victims and perpetrators’ (2001) 74 *The Police Journal* 202, 207 examples include severe depression and post-traumatic stress disorder. S Ben-David and P Stiflen ‘Rape, death and resurrection: male reaction after disclosure of the secret of being a rape victim’ (1993) 12 *Medicine and Law* 181, 181 report that male and female children who have been raped or subject to other forms of sexual abuse are at risk of suicide, self-abuse and substance abuse, and at pages 184-185 the authors state that adult males who were sexually abused as children often suffer from extremes of anger as this subgroup of victims is less likely to seek treatment than others. Women and children are typically the targets of this anger. See *Hewitt v S* 2017 (1) SACR 309 (SCA) at para 12 where adult victims of childhood rapes state that they struggled with intimate relationships as a direct result of their attacks. One rape survivor also indicated that as a result of her rape she led a self-destructive life.

²³² The United Nations Voluntary Fund for the Victims of Torture *The Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (2011) at pages 18 - 20 (date of access 17 March 2017).

²³³ See Chapter 2 where this is demonstrated .

²³⁴ Act 32 of 2007.

²³⁵ C Bijleveld ‘Sex offenders and sex offending’ (2007) 35 *Crime and Justice* 319, 320.

²³⁶ M L Woolley ‘Marital rape: a unique blend of domestic violence and non-marital rape issues’ (2007) 18(2) *Hastings Womens Law Journal* 269, 274. L Bienen ‘Defining incest’ (1997 – 1998) 92 *Northwestern University Law Review* 1501, 1576.

position of trust and financial power over a victim renders them particularly vulnerable.²³⁷ It is submitted that the severity of a sex crime is compounded by factors such as the deep humiliation felt by victims of sex crimes;²³⁸ the betrayal of trust caused by the assailant; and that the victims are sometimes children²³⁹ who are particularly vulnerable due to their age.²⁴⁰

5.3.4 Criminal defamation

Criminal defamation is the unlawful and intentional²⁴¹ violation of a person's reputation through the publication of information. A person's reputation is the esteem in which the person is viewed by others. The crime of criminal defamation thus requires that the information which lowers this esteem be made known to someone other than the victim so that the victim's reputation is damaged. Such information must in the eyes of 'a right - thinking person generally', lower their opinion of the victim.²⁴² It is submitted that in some instances, criminal defamation is capable of amounting to severe mental suffering for the purposes of the definition of torture,²⁴³ but is most likely to meet the severity requirement for torture only when combined with other crimes.²⁴⁴

5.3.5 Kidnapping

Kidnapping is the intentional and unlawful deprivation of a person's freedom of movement.²⁴⁵ It is not required that a person be removed from one place to another, just that the victim be deprived of their freedom of movement. The victim is rendered powerless in that escape may be impossible or come with the risk of being caught and perhaps punished. It is further submitted that kidnapping may be severe enough to amount to torture if the victim is kept in

²³⁷ Bienen *op cit* at footnote 236.

²³⁸ Bijleveld *op cit* 320 & 372.

²³⁹ Bijleveld *op cit* 360 states that the majority of males who experience some form of sexual abuse do so as children.

²⁴⁰ J Lindt 'Protecting the most vulnerable victims: prosecution of child sex offenses in Illinois *post Crawford v Washington*' (2006 – 2007) 27 *Northern Illinois University Law Review* 95, 129 this is attributed to their dependence on others and general trusting nature.

²⁴¹ Burchell *op cit* at page 745 the intention must be to injure the reputation of the victim.

²⁴² Burchell *op cit* at pages 714 and 744.

²⁴³ Torture Act s 3. See J Opdam 'Unraveling HIV stigma in South Africa' (2014) 23(2) *Human Rights Defender* 32, 32. The disclosure or publication of a person's HIV status if they are HIV positive often comes at a price. Victims face exclusion, ostracism, and questions around their sexuality and gender.

²⁴⁴ See: *McCallum v South Africa supra* at footnote 68.

²⁴⁵ Snyman *op cit* at page 479.

isolation²⁴⁶ or is combined with other crimes.²⁴⁷

5.4 Conclusion

This chapter demonstrates that the culmination of various statutory or common law crimes, or extreme instances of a statutory or common law crime may meet the definition of ‘torture’,²⁴⁸ but for the requirement that the prohibited conduct be perpetrated by a state - linked official.²⁴⁹ The result is that the crime or crimes which comprise the conduct which would amount to torture had they been committed by a state-linked person have to be prosecuted as ordinary crimes.

²⁴⁶ See: pages 17 – 19 in the text above where solitary confinement is discussed. It is submitted that isolation need not imply state sanctioned isolation and includes private instances.

²⁴⁷ See: text on page 42 above where this point is argued for.

²⁴⁸ Torture Act s 3.

²⁴⁹ Torture Act s 3(b).

Chapter 6: Conclusion

6.1 Findings

It is submitted that it has been demonstrated that international human rights law places no obstacles in the way of the South African Parliament criminalising torture perpetrated by private persons. In addition, the right to be free from torture contained in the South African Bill of Rights operates horizontally. Torture is regarded as a particularly serious crime²⁵⁰ and efforts are underway to stamp it out.²⁵¹ The Constitution of the Republic of South Africa envisages a society where every person is protected against torture.²⁵²

Parliament has chosen to limit the application of the Torture Act to state actors who perpetrate the crime. This is not automatically unconstitutional as victims of torture perpetrated by private persons are not left without a remedy. Their torture may be prosecuted under the name and requirements of other crimes. Within the bounds of this dissertation there are no constitutional impediments to extending the crime of torture to private perpetrators. The failure to extend the crime beyond its current legislative framework is not unconstitutional yet it is submitted that further study be instituted to investigate this matter from other perspectives.

6.2 Recommendation

It is submitted that distinguishing between the victims of crimes based on the perpetrators affiliation to the state or not may result in what would otherwise amount to torture if perpetrated by a state actor, being seen as less of a crime simply because it is prosecuted, for instance, as assault with intention to do grievous bodily harm. The United Nations Committee Against Torture (CT) argues that the creation of a specific crime of torture is necessary because:

- a) it identifies and singles out torture as a crime of severe gravity, making this evident to

²⁵⁰ *Filártiga v Peña Irala* 630 F 2d 876 (2d CIR 1980) Kaufman J at part IV available at <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf> (date of access 7 November 2015).

²⁵¹ See Chapter 3.

²⁵² *Ibid.*

- the public, perpetrators and victims;
- b) it emphasises the need for punishment which takes the abhorrent nature of the offence into account;
 - c) it strengthens the deterrent effect of the offence;
 - d) it improves the ability of responsible persons to monitor for the presence and prevalence of the crime; and
 - e) it promotes transparency such that the public may monitor, and, if necessary take action against an errant state.²⁵³

The present writer respectfully agrees with the CT in this regard. Torture is an abhorrent act. The South African Bill of Rights²⁵⁴ provides a clear opportunity for the South African Parliament to promulgate legislation which deals decisively with torture perpetrated by any person, regardless of their affiliation.

6.3 Suggested further area of research

It is submitted that a fruitful area of further research on the topic of torture in South Africa would be to examine whether or not state linked perpetrators are being tried and convicted for the crime of torture. From this it could perhaps be determined if the Torture Act is an effective tool in the prevention of torture.

A further area of research, it is submitted, might be that if it is found that state-linked perpetrators of torture are being prosecuted under the Torture Act, a study could be conducted to collect data on the sentences handed down by our courts to these perpetrators. These sentences could then be compared to instances where private perpetrators of torture who were prosecuted under other statutory laws and the common law were sentenced for crimes with the same or similar facts. This would allow any disparities between the two to become apparent and possibly open the door for an investigation as to whether this violates the right to be free from torture contained in s 12(1)(d) of the Constitution when examined under the limitations clause in s 36 of the Constitution. If it is found that any sentence disparities are not capable of justification under s 36 of the Constitution, the Torture Act would need to be

²⁵³ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties CAT/C/GC/2, 24 January 2008 at para 11.

²⁵⁴ Section 12(1)(d).

amended to correct this by perhaps including private perpetrators of torture in the definition of 'torture'.

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